APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

A. W. SCHAFFER, d/b/a SCHAFFER
TRANSPORTATION COMPANY,

and

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Plaintiffs,

vs

UNITED STATES OF AMERICA,

and

INTERSTATE COMMERCE COMMISSION,
Defendants.

Civil No. 624—N. D.

OPINION

Donald A. Morken, Minneapolis, Minn., (R. G. May, Sioux Falls, S. D., with him on the brief), Attorneys for Plaintiff, Schaffer.

Peter T. Beardsley, Washington, D. C., Attorney for American Trucking Associations, Inc.

H. Neil Garson and Robert W. Ginnane, Washington, D. C., Attorneys for Interstate Commerce Commission.

James E. Kilday and Edward Knuff, Washington, D. C., Stanley N. Barnes, Assistant Attorney General and Clin-

ton G. Richards, United States Attorney, with them on the brief), Attorneys for United States of America.

Robert J. Bernard, and H. F. Chapman, Sioux Falls, S. D., R. W. Cronon, Joseph Hays and Carl Helmetag, Jr., Philadelphia, Pa., James G. Lane, Amos N. Mathews and James W. Nisbet, Chicago, Ill., Attorneys for Intervening Railroads.

Before VOGEL, Circuit Judge, and MICKELSON and DEVITT, District Judges.

MICKELSON, District Judge.

This statutory three-judge court action was brought by the plaintiffs to set aside the report and order of the Interstate Commerce Commission pursuant to Sec. 205 (g) of the Interstate Commerce Act, 49 USC, Sec. 305 (g), Sec. 10, of the Administrative Procedure Act, 5 USC, Sec. 1009 and Sec. 1336, 1398, 2284, 2321 to 2325, of the Judicial Code, 28 USC, Sec. 1336, 1398, 2284 and 2321-2325, incl. That report and order was entered by the Commission in Docket No. MC-93529 (Sub. No. 2), A. W. Schaffer Extension – Granite.

The applicant, A. W. Schaffer, d/b/a Schaffer Transportation Company, sought authority to operate as a common carrier by motor vehicle in interstate or foreign commerce, over irregular routes, in the transportation of granite, manufactured and rough:

(1) From points in Grant County, South Dakota, to points in West Virginia, Maryland, Connecticut, Massachusetts, Vermont, Texas, Arkansas, Louisiana, Wyoming, North Dakota and the District of Columbia;

(2) From points in Vermont to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas and Louisiana.

The original hearing on the application before an examiner for the Commission was held June 13, 1952. Prior to the issuance of the examiner's recommended report and order applicant petitioned for a further hearing. By order dated September 9, 1952, the matter was reopened for further hearing, which was held on December 2, 1952, before the same examiner. Protests against the application were filed by rail carriers in New England territory on June 14, 1951; by Texas Railroad Association and Class 1 Rail Carriers in Southwestern Line Territory on June 18, 1951; and by Trunk Line Central territory railroads, except the C. & O. Ry. Co., on July 9, 1951. Wm. Dingmann, d/b/a Granite City Transfer, of St. Cloud, Minn., appeared in opposition to the application in addition to the protesting railroads. At the further hearing, in addition to the parties noted above appearing in opposition to the application, Class 1 Western Rail Carriers also intervened in opposition thereto.

On February 10, 1952, the examiner issued his report and recommended order that the authority requested by the applicant be granted.

Exceptions to the examiner's report and recommended order were filed by Class 1 Western Trunk Line Rail Carriers, by Wm. Dingmann, d/b/a Granite City Transfer, and by the eastern railroads, except the C. & O. Ry. Co.

Thereafter the Commission, Division 5, with Commissioner Elliott dissenting, issued its report and order, decided May 24, 1954, granting the authority sought by the applicant and as recommended by the examiner except that it denied the authority from Grant County, South Dakota, to points in the states of Maryland, Connecticut, Massachusetts, Vermont and the District of Columbia, because of motor carrier service then in existence furnished by Wm. Dingmann, d/b/a Granite City Transfer, the protesting motor carrier.

Following the report and order of Division 5, a petition for reconsideration, and, in the alternative, a petition for a hearing de novo, was filed by the eastern railroads. A similar pleading was filed by the Class 1 Western Trunk Line Rail Carriers.

By order entered Nov. 12, 1954, the Commission, Division 5, granted the petitions for reconsideration but denied the petitions in all other respects. The entire Commission thereafter took up the matter and on Feb. 7, 1954, entered its order with an accompanying report, denying the application. This is the report and order which is challenged by the plaintiffs herein.

On March 7, 1955, Barre Granite Assn., Jones Bros., and Rock of Ages Corporation of Barre, Vermont, filed a petition for intervention, oral argument and reconsideration. Schaffer on the same date filed a petition for oral argument and reconsideration. On March 9, 1955, plaintiff, American Trucking Assn., filed a petition for leave to intervene and for reconsideration. Replies to these petitions were filed by eastern railroads, except the C. & O. Ry. Co., and by the Class 1 Western Trunk Line Rail Carriers.

On May 16, 1955, the Commission entered an order permitting the parties seeking intervention to intervene and denying the petitions in all other respects.

On August 8, 1955, plaintiffs filed the instant complaint in this court, seeking to set aside the Commission's report and order of Feb. 7, 1954, which denied authority, and the order of May 16, 1955, which permitted the parties seeking intervention to intervene and which denied the petitions for reconsideration.

The transcript of testimony before the Commission consists of 341 pages and 24 exhibits, in addition to numerous voluminous pleadings which were filed with the Commission for its consideration.

The principal issues raised in this case are whether there is a reasonable and rational basis for the orders predicated upon the findings of the Commission and whether the Commission's actions in the premises complies with the Congressional mandate as set forth in Part 2 of the Interstate Commerce Act. (49 USC 301-327) and the National Transportation Policy, (49 USC, preceding Sec. 1).

The scope of judicial review of the decisions of independent administrative bodies, in this case the Interstate Commerce Commission, is now well settled and is no longer open to question. The rule may be stated in various ways, one of which is, that findings of fact and permissible conclusions thereon, based upon substantial evidence, are final, conclusive and binding upon the Court. I.C.C. v. Union Pacific R. R. Co., 222 U. S. 541, 547-548. In U. S. v. Pierce Auto Freight Lines, Inc., 327 U. S. 515, 536, the Supreme Court said that the function of a reviewing court " * * * is limited to ascertaining whether there is a warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law, or abuse of the Commission's discretion, a reviewing court is without authority to intervene."

In the development of the doctrine and rule of administrative finality, courts have uniformly held that it is the exclusive province and function of administrative agencies to draw legitimate inferences of fact and make findings and conclusions of fact, to appraise conflicting testimony or other evidence, to judge the credibility of witnesses and the evidence adduced by the parties, and to determine the weight of the evidence. Ill. Cent. R. R. Co. v I. C. C., 206 U. S. 441-454; I. C. C. v Union Pacific R. R. Co., supra; Alton R. R. Co v U. S., 315 U. S. 15-22. And what has just been said holds true even though the court believes that the decision of the administrative body lacks wisdom; though the court would weigh the evidence differently and

reach a different conclusion from that of the agency; or that the final decision is inconsistent with prior determinations arising under analagous or similar basic circumstances. Rochester Tele. Corp. v U. S., 307 U. S. 125, 146, at p. 139; I. C. C. v Nor. Pac. R. R. Co., 216 U. S. 538, 544; Ill. Cent. R. R. Co. v. I. C. C., supra, p. 454; U. S. v Pierce Auto Freight Lines, Inc., supra.

Sec. 10 of the Administrative Procedure Act, (5 USC, Sec. 1009) has codified the limitations of a judicial review of administrative decisions, and that act is controlling. See Riss & Co. Inc. v. U. S., 341 U. S. 907; Wong Yang Sung v. McGrath, 339 U. S. 33; Acme Fast Freight v. U. S., 116 Fed. Supp. 97.

Plaintiffs in this case mainly urge that the Commission's conclusion is not supported by substantial evidence and therefore is unsupported by the record, is arbitrary and contrary to law. They also ask this Court to consider and make findings with respect to the fact that the public is entitled to service by both forms of transportation, trucks and rail.

In final analysis the Commission was required to determine that the proposed service of applicant is or will be required by the present or future public convenience and necessity under 49 USC, 307 (a).

The extent of the Commission's authority in matters concerning the grant or denial of a certificate of public convenience and necessity has been considered in numerous judicial decisions and appears to be well settled. In an early leading case, C. & O. Ry. Co. v. U. S., 283 U. S. 35, 42, the Supreme Court said:

> "There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in

the exercise of a reasonable judgment, to determine that question."

See also T. & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co., 270 U. S. 266, 273; Colorado v. U. S., 271 U. S. 153, 168; Powell v. U. S., 300 U. S. 276, 287.

In the case of Interstate Commerce Commission v. Parker, 326 U. S., 60, 65, the Supreme Court stated:

> "Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from a half-century experience of the government in the regulation of transportation. When Congress in 1935 amended the Interstate Commerce Act by adding the Motor Carrier Act, it chose the same words to state the condition for new motor lines which has been employed for similar purposes for railroads in the same Act since the Transportation Act of 1920, Section 402 (18) and (20), 41 Stat. 477. Such use indicated a continuation of the administrative and judicial interpretation of the language. Cf. Case v. Los Angeles Lumber Co., 308 U. S. 106, 115. The Commission had assumed, as its duty under these earlier subsections, the finding of facts and the exercise of its judgment to determine public convenience and necessity. This Court approved this construction. C. & O. Ry. Co. v. U. S., 283 U. S. 35, 42. Cf. Gray v. Powell, 314 U. S. 402, 411-12. The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor carrier service would serve public convenience and necessity. Cf. Powell v. U. S., 300 U. S. 276, 287. This, of course, gives administrative discretion to the Commission, Cf. McLean Trucking Co. v. U. S., 321 U. S. 67, 87-88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances."

Plaintiffs herein contend that the public is entitled to service by both forms of transportation, truck and rail, under a proper interpretation of the National Transportation Policy and the provisions of the Interstate Commerce Act.

As to the first contention, the Commission has spoken many times, and very recently in the case of International Transport, Inc. Extension—Tractors and Farm Machinery, No. MC 113855, and Kenosha Auto Transport Corp. Extension—Racine, Wis., No. MC 30837, Sub. 159, decided Dec. 16, 1955, and subsequent to its decision here under review. In these cases (decided together) the Commission, Division 1, said:

> "The basic issues raised by petitioners are, in substance:
>
> (1) Whether the supporting shippers who allegedly are dependent solely upon rail carriers for transportation are entitled, as a matter of law, to motor as well as rail service.
>
> (2) Whether each applicant has sustained the burden of proving that the supporting shippers are unable to obtain reasonably adequate service from the existing rail carriers and have a real need for the proposed motor service to supplement rail service."

The Commission did, in those cases, grant the authority sought, and applicant here urges these cases as authority for the contention that if the Schaffer application was before the Commission at the present time, the authority sought would be granted. We do not think these cases can be so interpreted. There the Commission said:

> "At the outset it is well to stress that the mere absence of motor carrier service is not, standing alone, sufficient justification for the granting of an application to institute such service. In numerous proceedings where a grant of motor carrier authority has been made, it has been stated that the public is entitled to both motor and rail service. However, in all such proceedings it has been found, as required by the statute, that public convenience and necessity required the proposed service, and such findings were based on all of the facts of record in each proceeding including the nonexistence of reasonably adequate motor carrier service. Any implication which might be drawn from

> the report in these proceedings that the mere absence of motor service, without more, is enough to justify a grant of motor carrier authority, is inaccurate."

The Commission there also said, in granting the authority, that the over-all rail service had been something less than reasonably adequate for the supporting shippers' needs. In the present case the full Commission found, upon the question of public convenience and necessity, that existing rail service was "reasonably adequate."

When called upon to review orders of the the Commission denying or granting certificates of convenience and necessity based on the adequacy or inadequacy of existing services, the courts have approved the test used by the Commission. Capitol Transit Co. v. U. S., 97 Fed. Supp. 614, 620; Hudson Transit Line v U. S., 82 Fed. Supp. 153, 157; McLean Trucking Co. v U. S. 63 Fed. Supp. 829, 832.

In confirming this general principle it seems quite clear that the Courts are of the same view as the Commission, namely, that the adequacy of the existing service is to be determined by weighing the needs of the shippers against the capabilities and facilities of the existing carriers without regard to whether the existing service is provided by the railroads or other motor carriers. See I. C. C. v. Parker, supra.

While in the instant case the examiner did recommend the granting of the proposed authority and Division 5 of the Commission in a three to two decision ordered the authority granted (except as to certain points hereinbefore mentioned served by Dingmann), and the full Commission in a six to four decision, with one member not participating, did upon the same record deny the authority; such is not enough for this Court to cancel and set aside the final order of the Commission. The fact that such difference of opinion existed in the minds of the examiner, the members of Division 5 and the full Commission, all experts in the

field of public transportation, serves to stress the fact that reasonable minds can and did differ upon the weight of the evidence and the conclusions to be drawn therefrom, in determining the ultimate question of the granting or refusal of the authority sought by the applicant, Schaffer.

We have carefully reviewed the evidence in this case, and without detailing it, we are unable to say that the Commission's conclusions and orders are not supported by substantial evidence, or that it acted illegally, arbitrarily or capriciously.

While we wish to note that had we been acting in place of the Commission in this case, we may have reached different conclusions, this fact will not justify our setting aside the report and orders of the Commission. I. C. C. v. Union Pacific R. R. Co., supra; Miss. Valley Barge Line Co. v. U. S., 292 U. S. 282, 287; Rochester Tele. Corp. v U. S., supra; Universal Camera Corp. v Labor Board, 340 U. S. 474, 497.

Plaintiff, American Trucking Association, particularly argues that the Commission in this case has acted contrary to and has not carried out the National Transportation Policy, (49 USC preceding Sec 1). And, further, that the Commission in recent years has changed its policy in determining public convenience and necessity. We cannot agree with either of these contentions as a matter of law. The burden of proof showing a need for the proposed service under the provisions of Sec. 207 (a) of the Interstate Commerce Act was upon the plaintiff. The Commission did not deny the application on the ground that rail service in and of itself was adequate. It purported to weigh all of the salient factors constituting proof of need for the service and in the light of the entire record found that there wasn't any need for the service which could not be handled adequately by existing carriers, both motor and rail.

The Commission is not required to set forth its findings in the terms of the provisions of the National Transportation Policy. In Luckenbach S. S. Co. v U. S., 122 Fed. Supp. 824, affirmed per curiam, 347 U. S. 984, Judge Hand, pp 827-8, said:

> "It is clear that the expressed policy must serve as a guide to the Commission in all its decisions. United States v. Great Northern R. Co., 343 U. S. 562, 576, 72 S. Ct. 985, 96 L. Ed. 1142; McLean Trucking Co. v. United States, 321 U. S. 67, 82-84, 64 S. Ct. 370, 88 L. Ed. 544. However it seems equally clear that the Commission can not and should not be required to discuss each consideration expressed in the National Transportation Policy in every decision it renders. 'The basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented.' Alabama Great Southern R. Co. v. United States, 340 U. S. 216, 288; 71 S. Ct. 264, 95 L. Ed. 225. It is only necessary that the essential basis of the Commission's order appear in the report so that a court can satisfy itself that the Commission has performed its function. See Newtex S. S. Corp. v. United States, D. C., S. D. N. Y., 107 Fed. Supp. 388, affirmed 344, U. S. 901, 73 S. Ct. 285, 97 L. Ed. 696; Capital Transit Co. v. United States, D. C., D. C., 97 Fed. Supp. 614, 621."

While the Commission in its final report changed its mind, this does not constitute reversible error subject to review by this court. In Beard-Laney v. U. S., 83 Fed. Supp. 27, 33, affirmed 338 U. S. 803, Judge Parker said:

> "The rules to be applied in reviewing the order of the Commission are not different because that order resulted from a reversal of the prior decision of the hearing division upon a petition for rehearing. The fact that a rehearing was granted shows that the questions involved were carefully considered and the ultimate decision of the division, which received the approval of the Commission, was the final and definitive action of the Commission, which is what we are authorized to review; and it is to be reviewed in the same way and under the same limitations as other

reviewable orders. We may not substitute our judgment for that of the Commission because upon a rehearing and fuller consideration of the fact it has arrived at a different conclusion from that which its hearing division had first expressed. Lang Transp. Co v. United States, D. C., 75 F. Supp. 915, 925."

While, as above indicated, this Court may have reached a different conclusion if it had been weighing the evidence in this case, we must and do find that the Commission acted within the scope of its authority, that it acted without abuse of its discretion, that its action was not arbitrary or capricious, and that there were adequate facts to support its findings and that its conclusions are not contrary to law.

For the reasons hereinbefore stated plaintiff's complaint will be dismissed.

March 13, 1956.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

A. W. SCHAFFER, d/b a SCHAFFER TRANSPORTATION COMPANY, and AMERICAN TRUCKING ASSOCIATIONS, INC.,
Plaintiffs

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Defendants.

CIVIL ACTION FILE NO. 624 N. D.

JUDGMENT

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on January 24, 1956, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises; and having on March 13, 1956, filed herein its opinion, holding that the order of the Commission denying a certificate of public convenience and necessity to engage in interstate or foreign operations by motor vehicle on public highways is legal and valid, it is hereby

ORDERED, ADJUDGED, AND DECREED that the relief prayed for by plaintiff, be, and the same hereby is, denied, and the complaint be, and the same hereby is, dismissed.

This the 17th day of May, 1956.

CHARLES J. VOGEL
United States Circuit Judge
GEORGE T. MICKELSON
United States District Judge
EDWARD J. DEVITT
United States District Judge

Attest:

ROY B. MARKER
Clerk.

(SEAL OF COURT)

(Indorsed)—Filed May 25, 1956, Roy B. Marker, Clerk.

APPENDIX C

This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

INTERSTATE COMMERCE COMMISSION

No. MC-93529 (Sub-No. 2)

A. W. SCHAFFER EXTENSION—GRANITE

Submitted May 27, 1953 Decided May 24, 1954.

Public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, of rough and finished granite, (1) from points in Grant County, S. Dak., to points in six states and (2) from points in Washington and Orange Counties, Vt., to points in 16 States, over irregular routes. Issuance of a certificate approved upon compliance by applicant with certain conditions and application in all other respects denied.

Donald A. Morken and *J. L. Hetland* for applicant.

Frank M. Coyne, R. W. Cronon, James G. Lane, and *Claude G. Metzler* for protestants and interveners in opposition to the application.

REPORT OF THE COMMISSION

DIVISION 5, COMMISSIONERS CROSS, ELLIOTT, AND TUGGLE

BY DIVISION 5:

Exceptions were filed by certain protestants and interveners to the order recommended by the examiner, and

applicant replied. Our conclusions differ somewhat from those recommended.

By application filed May 28, 1951, as amended, A. W. Schaffer, of Revillo, S. Dak., doing business as Schaffer Transportation Company, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of granite, manufactured and rough, (1) from points in Grant County, S. Dak., to points in West Virginia, Maryland, Connecticut, Massachusetts, Vermont, Texas, Arkansas, Louisiana, Wyoming, North Dakota, and the District of Columbia, and (2) from points in Vermont to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas, and Louisiana, over irregular routes. Wm. M. Dingmann, doing business as Granite City Transfer, hereinafter called Dingmann, class I carriers in western trunkline territory, New England territory railroads, Texas Railroad Association, and eastern railroads (except the Chesapeake & Ohio Railway), oppose the application.

Applicant holds a certificate authorizing, so far as here material, the transportation (1) of granite from points in Grant County to points in Montana, Colorado, Nebraska, Kansas, Oklahoma, Missouri, Iowa, Minnesota, Wisconsin, Michigan, Illinois, Indiana, Ohio, Pennsylvania, and New York, and (2) of silicon carbide from Niagara Falls, N. Y., steelshot from Mansfield, Ohio, and polishing stucco from Ft. Dodge, Iowa, and Chicago Heights, Ill., to points in Grant County, over irregular routes. The purpose of the instant proposal is to enable applicant to enlarge the destination territory of his present granite operations out of Grant County and to institute a new, similar west and southbound service from Vermont origins to the 16 States named in that part of

the application. A grant of this authority would be advantageous to applicant from both an operational and financial standpoint, inasmuch as he would be able to obtain additional traffic and also better balance his overall operations. He operates 14 tractor-trailer units and one additional tractor, of which six units are used exclusively for the movement of granite. Four units generally are used in the conduct of his private operations, described below. In the event the application is granted, vehicles used in transporting shipments from Grant County to certain eastern destinations, such as Ohio, West Virginia, Maryland and the District of Columbia, would be deadheaded to the Vermont origin area under consideration to pick up west-bound traffic.

There are three granite fabricating plants in the concerned South Dakota territory, some of which have their quarries and finishing plants in separate locations. In 1951, applicant transported a total of 157 loads of granite out of this area. At present, he transports one load a week to points in New York and Pennsylvania and frequently returns with empty equipment. If the proposed service is authorized, he intends to station a dispatcher and several pieces of equipment either at Barre or Montpelier, Vt., and to perform a "shuttle" service between the described South Dakota and Vermont origins. He now offers third-day delivery from Grant County to points in Illinois, Indiana and western Ohio, and fifth-day delivery to upstate New York points. He estimates that an additional day will be required to serve the proposed New England points and from five to eight days the southern and eastern destinations involved. The delivery time from Vermont would be approximately the same as that from Grant County.

In addition to his motor carrier business, to which he devotes about 90 percent of his time, applicant also is connected with several other enterprises. He operates a

garage at Alby, S. Dak., owns a farm which from time to time is leased to others, and is a wholesale distributor of feed and other products for the Carey Salt Company. Separate books are maintained for each of these businesses. Applicant's consolidated balance sheet as of December 31, 1951, shows assets aggregating $38,414.62, of which $2,463.06 are current assets; total liabilities of $16,448.93, including current liabilities of $1,773.93; and a net worth of $21,965.69. His total net income for 1951 was $844.13. Applicant is fit and able, financially and otherwise, properly to conduct the proposed operation.

One shipper supports the authority sought in (1) of the application and two shippers, six receivers and one association support the remaining portion of the application.

The Dakota Granite Company, of Milbank, S. Dak., has two quarries in Grant County where it quarries granite which it finishes into mausoleums, monuments and building granite. These products are shipped to retail outlets by truck and by rail, principally in less-than-carload quantities. Since shipper's facilities are located about 6½ miles from a rail siding, it must use a local trucker to place tonnage at the railhead which is more expensive and inconvenient than loading directly at its plant. It now satisfactorily uses applicant's existing service two or three times a week and expresses a need for a similar service to the proposed States. If such service were made available, shipper would use it, in addition to other points, seven or eight times a year for the movement of shipments destined to the concerned New England area. At present, it has orders on file from customers in Texas, Arkansas, North Dakota, West Virginia and the New England States. All of these customers have requested delivery by motor carrier. Shipper is developing a new territory for its products in Texas and would like to have motor service available for the transportation of any

traffic that may result. In this connection, it states that it cannot, at first, expect orders large enough to require carload shipments and less-than-carload shipments might prove to be too costly for the dealer to handle initially. It estimates that in the beginning only about 24,000 pounds a year would move to that particular area. It now has a contract under which it is shipping by rail substantial quantities of granite to a project in North Dakota near the Canadian border. Motor service also has been requested for the delivery of this traffic. Shipper's customers pay the freight charges and have the privilege of requesting the carrier to be used. In most instances, they request motor service for the movement of their small shipments. The main reason its dealers at eastern points prefer motor rather than rail service is because they are able to obtain split deliveries in small quantities at a reasonable cost. Furthermore, shipments moving by motor carrier arrive at their destinations faster and usually without being damaged. From the shipper's standpoint, it is also more economical to use applicant's service rather than rail because the cost of cartage to the rail siding is eliminated and the crating of the monuments need not be so extensive. Shipper has not used the service of intervener Dingmann in the past two years primarily because of rate considerations. Moreover, it prefers to use a carrier whose equipment is stationed near its place of business. It takes Dingmann three hours from St. Cloud, Minn., to pick up a shipment after being called, whereas shipper can obtain a truck from applicant in 30 minutes.

Osborne-Peterson, Inc., of St. Paul, Minn., a retail monument dealer, fabricates and letters granite monuments and markers. It receives both rough and finished granite from Vermont exclusively by rail, mainly in carload lots, and intends to continue using that service. Less-than-carload service is used when pool-car service is

not available and there is a rush for a particular shipment. Dealer received one such shipment during the period from January 1 to June 13, 1952. That shipment which weighed 2,540 pounds, and consisted of five polished granite markers, separately crated, was shipped on April 28, and received on May 27. One of the crates was broken in transit and all the markers were damaged, thus rendering them unsuitable for the purpose for which they were ordered. As a rule, the transit time on less-than-carload traffic ranges from 3½ to 6 weeks. Dealer's interest in the proposed operation is motivated by its desire to receive less-than-carload traffic faster and in better condition than it is now arriving, especially during the two months preceding Memorial Day, which is its busiest season. Under existing conditions, a monument should be delivered at its place of business some time in March to assure Memorial Day installation. If authorized, dealer estimates it would use the proposed service six or eight times a year for the movement of either truckload or less-than-truckload shipments.

A dealer at Hutchison, Kans., retails public and private memorials to customers located generally in the southwest corner of Kansas. He purchases from 40,000 to 60,000 pounds of finished granite annually from manufacturers at Barre, Vt., which tonnagewise amounts to approximately six less-than-carload and four pool-car shipments. This traffic moves over multiple-rail lines to Kansas City, the break-bulk point, then is delivered to the consignee either by local rail or motor service. Dealer's testimony relative to the transit time involved on shipments from Vermont is conflicting, however, it appears that although over a period of time the average shipment is en route 10 days, a transit time of from 14 to 21 days is not uncommon. In recent years, dealer has experienced a little damage in using rail service, but does not consider it to be undue. He is interested in the pro-

posed operation as it will reduce the amount of crating now necessary to protect the granite, require less handling of the lading, and be faster than existing rail service. Generally, his peak period extends from March to June, with April 1 being the "cut-off" date for Memorial Day deliveries. Applicant has assured him of a 9-day service, at the most, from Barre, which would be advantageous as it would enable him to extend the deadline for deliveries by as much as two weeks, in some instances. Dealer states that speed is an essential element in the transportation of granite from Vermont and that, if authorized, he would utilize applicant's service mostly for the movement of less-than-truckload shipments involving split deliveries.

A retail monument dealer at Fremont, Nebr., receives from Vermont origins, in either pool-car or less-than-carload quanitities, six or seven shipments of finished granite a year, amounting to approximately 25,000 pounds. The proposed operation would be advantageous to him for several reasons. First, and most important, because it would be faster and more reliable than existing rail service and, thus, enable him to predict with some degree of accuracy when shipments would arrive. This is especially important during the peak season when delivery deadlines must be met and would permit him to compete more effectively with a nearby manufacturer who does his own finishing and who can, with reasonable certainty, estimate when a particular order will be ready for delivery. Additionally, he would be able to maintain a lower inventory and obtain transportation at a rate somewhat lower than that now in effect on less-than-carload shipments. He receives granite from sources in Minnesota by motor carrier and expresses a need for a similar type of service from Vermont origins.

A retail monument dealer at Moberly, Mo., receives his granite products from Barre by rail, mainly in less-than-

carload lots. The transit time in these shipments ranges from 7 to 18 days, with the average being 11.5 days. Because dealer is located on the terminal point of a railroad he considers rail service to be good. However, the proposed service would be advantageous, particularly during the peak season when expeditious service is required.

A monument dealer at Aberdeen, S. Dak., receives from 25,000 to 30,000 pounds of finished granite, except for lettering, a year from Barre. Because of the comparatively small size of his business, he is unable to stock carload quantities of monuments, and it is not practicable for him to utilize pool-car service in conjunction with the other dealers because of the great distances between dealerships. Consequently, he receives all of his freight in less-than-carload lots. These shipments arrive in about 17 days, frequently with the crates broken and, at times, with the monuments damaged. Since dealer has no facilities to repair damaged monuments, any piece of granite damaged must be reordered. The proposed service with its inherent advantages would be beneficial to his business.

A retail monument dealer at Loves Park, a suburb of Rockford, Ill., purchases about 25,000 pounds of custom-designed monuments a year from manufacturers at Barre. These monuments are ready for erection in the cemetery upon arrival, and any damage to them necessitates remanufacturing and, of course, redelivery. All of dealer's monuments move by rail, in less-than-carload lots, and are received monthly in quantities of three or less. The transit time of this traffic averages from three to five weeks. In using rail service, dealer has experienced quite some damage, consisting in some instances of monuments being marred by grease or oil, and in other instances, arriving with cracks in them. Formerly, dealer had his shipments delivered directly to his place of business, but because of delays at the railhead, he discontinued that

method of operation. He now performs that pickup and delivery service himself, receiving an allowance therefor from the railroad in those instances where the latter was to provide the transportation, and is satisfied with such arrangement. He would use the proposed service for the movement of almost all of his traffic.

Jones Brothers Company is engaged principally in the manufacture of granite monuments which are sold generally throughout the United States. So far as here material, all of its shipments originate at Barre and points within a radius of 5 miles thereof. In 1951, it shipped 1,600,000 pounds of granite to customers throughout the affected territory, of which 600,000 pounds moved in less-than-carload quantities and the remainder in either carload or pool-car shipments. Carload service has proven satisfactory, pool-car service not entirely satisfactory, and less-than-carload service unsatisfactory. The principal reason why the second-named method of transportation is not deemed adequate in all respects is because the dealer to whom the consolidated shipment is consigned is held responsible for all the freight involved, regardless of how many other dealers may be participating in the movement. Furthermore, in using this type of service, shipper must hold up its orders until sufficient tonnage is accumulated to constitute the pool car. At times, this creates a serious lull between the time the monuments are finished and the time they are shipped. Shipper is dissatisfied with the less-than-carload service because of the length of time the shipments are in transit; the damage that occasionally occurs to some of the merchandise; and the cost involved. It submitted in evidence an exhibit showing the dealers it is now supplying in the destination territory under consideration. Of the 117 named, 7 were in Minnesota, 2 in North Dakota, 6 in Montana, 9 in Colorado, 12 in Wisconsin, 31 in Illinois, 14 in Missouri, 12 in Iowa, 4 in Nebraska, 10 in Oklahoma, 3 in Arkansas,

5 in Texas, and one each in South Dakota and Louisiana. Shipper avers that many of its small dealers, due to the disadvantages connected with less-than-carload service, are changing their buying habits and purchasing granite at centers where they are able to obtain faster and cheaper motor transportation. In this respect, shipper points out that the lack of motor service is a severe handicap in competing with other producers of granite in Georgia and Minnesota which, it understands, have motor service available to the affected territory. In the event the proposed operation is not authorized, it is considering the possibility of instituting private-carrier operations for the movement of this traffic. It now uses certain motor carriers to New York and Pennsylvania destinations, but has not tendered these carriers any traffic to the considered area as it understands they do not provide such a service. It is of the opinion that, as a practical matter, a grant of the application would, in the long run, prove beneficial to the railroads because it would be able to acquire new dealers who, although at first may only buy in truckload or less-than-truckload quantities, subsequently could be built up to the point where they would require and buy in carload lots. Shipper desires motor service on a daily basis, if possible, and has no objection to the consolidation of its freight with that of other Barre manufacturers. It would not expect applicant to transport a single 1,000-pound shipment to, say, Greeley, Colo., nor does it anticipate such a situation as that to arise as applicant more than likely would have tonnage from other shippers destined to that general area. It estimates that about 3,000 pounds of granite would be tendered to applicant daily, if his service were made available. It supplies the previously mentioned dealers at St. Paul and Hutchinson and considers them to be typical customers.

Rock of Ages Corporation quarries granite and manufactures finished monuments and markers which are distributed throughout most of the United States. It has two plants in Vermont from which shipments to the proposed area are made, one at Montpelier, which is about 7 miles from Barre, and the other at Northfield, some 22 miles from Barre. At the present time, it is endeavoring to build up its distribution to all of its dealers, but particularly to those in the 16 States here involved, as they have a high agricultural population. In this regard, it has been shipper's experience that farmers provide the best market for its products. Currently, it has 168 dealers throughout the concerned destination territory to whom it ships a little over 5,000,000 pounds of finished granite a year. Of these dealers, 123 purchase in less-than-carload quantities and 45 in carload lots. Whenever possible, pool-car shipments also are made, but such service is not satisfactory because it is difficult for the dealer to whom all of the freight is consigned to pay the charge on th entire lot. Additionally, some dealers frequently have difficulty in collecting promptly from the other dealers participating in the movement, and others, find the task of unloading and reforwarding burdensome. At times, considerable rehandling of tonnage also is required in view of the fact that some dealers are not located on rail sidings. Less-than-carload service, which averages two weeks in transit and sometimes longer, is inadequate because of delays and the damage that occurs to the merchandise. During peak periods, such as Memorial Day, All Souls' Day, and Armistice Day these delays make it difficult for its dealers to meet erection deadlines. Shipper also is faced with the disadvantage of having to compete with other granite manufacturers in the south and west which have motor service available. It utilizes motor service througout New England and portions of New Jersey, Pennsylvania, and New York, but has never been abe to obtain service beyond Buffalo,

N. Y. It sells to all of the supporting dealers, except the one at Moberly. Like the previous shipper and for the same reason, it believes that the instant proposal, over a period of time, would not only aid its expansion program, but also would be helpful to the railroads from both a tonnage and revenue standpoint. Moreover, it states that there is a need for faster and more frequent service in order to give the smaller dealers who cannot now, due to the capital investment required, carry a representative group of monuments. It is of the conviction that there are excellent opportunities for expansion in such States as Missouri, Oklahoma, Texas, Arkansas, Nebraska, Iowa, and Minnesota and that its salesmen could successfully take advantage of these opportunities if the proposed service were made available. In the latter event, it would tender to applicant two or more truckloads, ranging from 24,000 to 30,000 pounds, each week.

The Barre Granite Association is a trade association consisting of 77 members all located in the Barre granite producing area. Of these members, 5 are carriers, 5 do custom sawing and polishing of granite and 67 are manufacturers of finished granite products. Included among the latter are the two shippers named immediately above. The function of the Association is to represent its members in traffic and shipping matters. It does not sell granite but limits its activities to the consolidation of shipments and the arranging of pool-car service out of Barre for its members. The latter ships to all of the States except Nevada. During the period extending from December 1, 1950, to December 1, 1951, this Association arranged for the pool-car movement of 268 cars of granite to 900 dealers in 25 States. Of this tonnage, 156 cars were consigned to dealers in the States covered by this portion of the application. The only motor service it selects is that used for local pickup-and-delivery service at each end of the movement. It favors a grant of

the proposed service and would assist its members in making use of it. It states the source of supply of granite in Vermont is limited to the Barre area in Washington County and Williamstown, Vt., in Orange County. The witness representing the association asserted that he also was authorized to represent 18 members of this association at the further hearing herein, on December 2, 1952. However, he was unable to present specific evidence relative to such matters as the tonnage each of the members ships and the particular destination points to which their traffic moves.

The Chicago, Milwaukee, St. Paul, and Pacific Railroad Company, the Texas and New Orleans Railroad Company, the Central Vermont Railway Company, and Dingmann presented evidence in opposition to the application.

Dingmann operates as a common carrier by motor vehicle, over irregular routes, of finished monumental and structural or partially finished granite from points in Grant County to points in certain eastern and midwestern States, including Maryland, Vermont, Connecticut, Massachusetts, and the District of Columbia. He has been hauling granite since 1941, and all of his drivers are experienced in the handling of that product. He maintains headquarters about 140 miles from Grant County and operates 10 pieces of equipment which, except during the two month period preceding Decoration Day, are not fully utilized. If the need arises for more equipment, he is able and willing to supplement his fleet. He offers five-to six-day service from points in Grant County to points in the States just named, and transports about two loads of granite a month from and to these points. Until about 18 months prior to June 13, 1952, the date of the first hearing herein, he provided service, without complaint, to the eastern territory here involved which he is authorized to serve, for the supporting shipper, Dakota Granite Company. He asserts the latter company discontinued

using his service solely because it considered his rates to be too high. He desires once again to serve that shipper, stating that his service is similar to that proposed by applicant. He is apprehensive that a grant of the requested authority would deprive him of the eastbound traffic he is now transporting from Grant County.

Milbank is located on the main line of the St. Paul and Pacific Railroad from which point the latter renders direct service to Chicago where connections are made with other rail carriers for service to points and areas involved in the application. The Texas and New Orleans Railroad Company is primarily concerned with the proposed service insofar as it pertains to points in Louisiana and Texas throughout which destination area it, in conjunction with other railroads, offers service. The Central Vermont Railway Company originates granite traffic at four of its stations, namely Barre, Montpelier, Northfield, and Waterbury, Vt., and competes with the Barre and Chelsea Railroad for the outbound movement of granite from that area. All of these rail carriers are ready and able to handle the involved traffic and believe that a grant of the application would have an adverse effect on their operating revenues.

The examiner recommended that the application be granted, except that service from the requested Vermont origins should be limited to Washington and Orange counties. The following contentions of exceptants, with duplications eliminated, will be disposed of individually or collectively in the ensuing discussion, depending upon the category into which they fall.

In their exceptions, certain class I rail carriers in western trunkline territory argue that the examiner erred in giving weight to the incidental inconveniences, such as delays in transit, damage to the merchandise and lack of proper rail sidings, experienced by the supporting ship-

pers; that the latter have available rail service which is adequate generally to meet their transportation needs and support the application mainly because of their desire for lower rates; and that the recommendation of the examiner, if followed by us, would result in the loss of highly desirable traffic and in the diminution of rail revenues, both of which they can ill afford. They also argue that the examiner erred in not permitting their cross-examination of a shipper witness which allegedly would have developed that "huge trucks do more than their share of damage and pay less than their share of the cost." They maintain that such cross-examination should have been permitted since it pertains to the public interest. In the same vein, they request, in the event a need is found for the service proposed, a further hearing for the purpose of permitting them to cross-examine applicant and the shipper witnesses, among other things, on the following matters: (1) whether applicant has damaged or will damage the public highways to the extent indicated in certain issues of Readers Digest, (2) whether applicant's operations from Grant County to points in Maryland would break up the roads to the extent established in the "Maryland road tests of June, 1950" and (3) whether the supporting witnesses agree with the views expressed in another article in Readers Digest. Interveners further assail as error the admission by the examiner of certain testimony touching on the subject of rates, and cite five instances thereof. They, therefore, request that a hearing de novo be granted wherein all evidence of that nature be excluded.

As to the procedural issue raised, the examiner sustained an objection to the following question asked by counsel for interveners on cross-examination of a shipper witness "Q. Did you see this article on page 41 entitled 'Huge Trucks Do More Than Their Share of Damage, Pay Less Than Their Share of the Cost'"? Irrespective

of whether this question may relate to the public interest or not, it manifestly is beyond the scope of the direct examination and the examiner's ruling is sustained.

Concerning interveners' allegation that the examiner erred in admitting certain testimony relative to rates, the record shows that no objection was made to such testimony in three of the cited instances. Furthermore, one of the attorneys representing interveners, which now vigorously condemn the admission of such evidence, was partially responsible by his interrogation for the evidence of this type being presented. In any event, although we agree generally that testimony of this character should not be admitted in proceedings of this nature we are not persuaded that interveners were prejudiced thereby. Assuming, however, that the referred-to evidence had been excluded, the results herein would not be different. In view of the foregoing, interveners' request for a hearing de novo is hereby denied.

With respect to the request for a further hearing, the record clearly shows that the rail carriers were afforded and took advantage of the opportunity to present and develop facts pertinent to this proceeding. The described information which they seek to elicit at a further hearing, however, would be of no significant probative value nor would it change the conclusion on the ultimate issue to be determined here, namely, whether a need has been established for the proposed operation. In the circumstances, the request is denied.

In their exceptions, eastern railroads aver that (1) the examiner was unduly impressed with the fact that there is no direct motor service available to points in the destination territory sought, (2) that his summary of the evidence is neither complete or entirely correct, (3) that applicant has made no study to determine if the proposed operation would be practicable and the evidence shows it would not, (4) that the rail carriers cannot be expected

to maintain a dependable and efficient service for the transportation of all classes of commodities, in whatever quantity offered, if a carrier such as applicant is permitted to enter the field on a "hit or miss" basis in the large area involved, and (5) that although the consignees would find the proposed operation a convenience during certain periods of the year, there is no evidence that applicant would be able to furnish such a service. More specifically, protestants argue that the evidence presented at the further hearing by the witness representing the Barre Granite Association and 18 member companies was hearsay in nature, inaccurately summarized by the examiner, and used to support an erroneous conclusion. They urge that the examiner erred in overruling their objections thereto. In the alternative to a denial of the application, protestants ask for hearing de novo on the ground that applicant failed to provide proper notice to motor carriers competitive with the proposed operations as required by section 5(a) of the Administrative Procedure Act.

We agree with protestants that the evidence adduced by the witness representing the association and 18 of its members, insofar as it related to any need that the 18 members may have for the proposed operation, was largely hearsay, and of no real probative value. Although we try to avoid technicalities, especially in procedural matters, to hold otherwise in this instance would be tantamount to denying protestants the right to cross-examine adverse witnesses, which, of course, is an essential part of a full and complete hearing. However, since our findings are not predicated upon the evidence which is objected to, protestants have not been prejudiced by the examiner's rulings, which, in the circumstances, we see no reason to reverse.

Section 5(a) of the Administrative Procedure Act provides in part that "Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place,

and nature thereof." Our examination of the application indicates that in addition to numerous rail carriers, at least six motor carriers as well as various motor carrier associations were notified of this proposal. Although it is true that only one motor carrier, to a limited extent, opposes the application, in view of the testimony of the various witnesses, it is reasonably clear that there are no motor carriers operating in the considered territory which afford a service similar to that proposed by applicant. Since the application was publicized as required by law, the fact that motor carriers other than Dingmann have not sought to intervene, standing alone, is not indicative that all persons entitled to notice did not receive it. Protestants' request for hearing de novo is denied.

Dingmann's exceptions are directed to the examiner's recommendation that applicant be authorized to operate from Grant County to points in Maryland, Connecticut, Massachusetts, Vermont, and the District of Columbia. He points out that the shipper at Milford is not now using his service to and from those points because of rate reconsiderations and argues that the application, to this extent, should, therefore, be denied.

In reply, applicant argues that all of the exceptions are without merit; that the examiner's findings are amply supported by the evidence; and that such findings should be sustained.

As previously indicated, the ultimate question to be resolved herein is whether a need has been established for the proposed operation. This issue cannot be answered affirmatively if both rail and motor carrier services are reasonably adequate. At this point it should be stressed that we agree with exceptants that the level of rate considerations and argues that the application, to however, that the supporting shippers, except as hereinafter noted, were motivated or influenced solely by their

desire for lower rates. While the evidence does reveal that the cost of transportation is of interest to them, their views as to the adequacy of existing service cannot be disregarded for that reason.

As seen, the shippers and receivers, other than the Dakota Granite Company, have no for-hire motor service available to them to and from the points covered by the instant application and, consequently, use rail service almost exclusively. They all agree that such service, in the main, is satisfactory for the transportation of carload shipments but entirely inadequate for the transportation of less-than-carload shipments, not only from the standpoint of cost, but also and primarily from a service standpoint. In this respect, the record shows that on movements of small shipments the supporting witnesses have experienced delays, damage to their merchandise, and have been hampered to some degree by the lack or insufficiency of rail sidings. In many instances, they have been asked by customers to furnish delivery by motor carrier but because of the lack of such service they have been unable to comply with these requests. Moreover, and no less important from a business point of view, the shippers are faced with the competitive disadvantage of having to compete with producers of granite at other locations which have truck delivery available. Then, too, the lack of truck service has impeded shippers' ability to increase their sales and expand their markets in this area. By use of the proposed service, certain other benefits also would accrue to the shippers or dealers. For example, the latter would be able to maintain lower inventories, receive their freight faster and more frequently, and thus, be able better to meet erection deadlines, especially during the peak seasons. Furthermore, the amount of crating now necessary would be reduced with resultant savings in time and money. Unquestionably, some traffic would be diverted from the railroads should the application be granted in

whole or in part. However, no carrier is entitled to protection from competition in the continuance of a service that fails to meet a public need, nor, by the same token, should the public be deprived of a new and improved service because it may divert some traffic from other carriers. In concluding that there is a need for the proposed service to the extent set forth in our findings, we have not overlooked the rail carriers' contention that the proposed service would not be practicable. There is nothing in the record, insofar as we can perceive, to substantiate this contention. In fact, the service proposed would tie in nicely with applicant's existing operation by providing him with return loads from Vermont origins. While his equipment would have to be deadheaded from certain eastern destinations to Vermont, the empty mileage involved would not be excessive so as to warrant the conclusion that the operation would not be feasible. Moreover, the tonnage which would be made available to applicant appears to be sufficient to enable him to provide an efficient and economical service.

The shipper at Milbank insofar as motor service is concerned, is in a somewhat better position than the other two shippers, as it has available Dingmann's service to certain of the points under consideration, namely, Maryland, Connecticut, Massachusetts, Vermont, and the District of Columbia. Since the evidence shows that this shipper discontinued Dingmann's service not because his service was unsatisfactory, but solely because of rate considerations, this portion of the application will be denied.

We find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of rough and finished granite (1) from points in Grant County, S. Dak., to points in Wyoming, North Dakota, Texas, Arkansas, Louisiana, and West Virginia, and (2) from points in Washington and Orange Counties,

Vt., to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas, and Louisiana, over irregular routes; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; that a certificate authorizing such operations should be granted; and that the application in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act and with our rules and regulations thereunder, an appropriate certificate will be issued. An order will be entered denying the application except to the extent granted herein.

COMMISSIONER ELLIOTT DISSENTS.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 24th day of May, A. D. 1954.

No. MC-93529 (Sub-No. 2)

A. W SCHAFFER EXTENSION—GRANITE

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application, except to the extent granted in said report, be, and it is hereby denied.

By the Commission, division 5.

(SEAL) GEORGE W. LAIRD
Secretary

APPENDIX D

INTERSTATE COMMERCE COMMISSION

No. MC-93529 (Sub-No. 2)

A. W. SCHAFFER EXTENSION—GRANITE

Decided February 7, 1955

Upon reconsideration, findings in prior report, decided May 24, 1954, reversed. Public convenience and necessity found not to require operation by applicant as a common carrier by motor vehicle of rough and finished granite, (1) from points in Grant County, S. Dak., to points in 10 States and the District of Columbia, and (2) from points in Vermont to points in 16 States. Application denied.

Donald A. Morken and *J. L. Hetland* for applicant.

Frank M. Coyne, R. W. Cronon, James G. Lane, Claude G. Metzler, and *J. P. Reedy* for protestants and interveners in opposition to the application.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

By application filed May 28, 1951, as amended, A. W. Schaffer, of Revillo, S. Dak., doing business as Schaffer Transportation Co., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of granite, manufactured and rough, (1) from points in Grant County, S. Dak., to points in West Virginia, Maryland, Connecticut, Massachusetts, Vermont, Texas, Arkan-

sas, Louisiana, Wyoming, North Dakota, and the District of Columbia, and (2) from points in Vermont to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas, and Louisiana, over irregular routes. Wm. M. Dingmann, doing business as Granite City Transfer, class I carriers in western trunkline territory, New England territory railroads, Texas Railroad Association, railroads, and eastern railroads, except the Chesapeake and Ohio Railway Company, oppose the application.

In the prior report herein, decided May 24, 1954, division 5 found that the public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of rough and finished granite, (1) from points in Grant County, S. Dak., to points in Wyoming, North Dakota, Texas, Arkansas, Louisiana, and West Virginia, and (2) from points in Washington and Orange Counties, Vt., to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas, and Louisiana, and that in all other respects the application should be denied. Thereafter, upon consideration of the record and of petitions of the opposing rail carriers, to which applicant replied, by order of November 12, 1954, division 5 reopened the proceeding for reconsideration on the present record. Subsequently, in the interest of expedition, and upon the recommendation of division 5, we assumed jurisdiction of the proceeding.

In their petition, class I western trunkline rail carriers contend (1) that the evidence fails to establish that the presently authorized transportation services are inadequate either because of lack of equipment, length of time in transit, or damage to lading; and (2) that the supporting witnesses are interested in the proposed service

merely because they feel that they will obtain motor-carrier transportation at lower rates than the existing rail rates.

The eastern railroads attack the prior report on a number of counts, some of which are repetitions in whole or in part. Among these are points which were raised in their exceptions to the report of the examiner and were considered by division 5 in the prior report.

The essence of the eastern railroads' contentions are (1) that the supporting witnesses are motivated by a desire for cheaper rates; (2) that the witnesses' expressed desire for more expedious service should be discounted because of their willingness to allow finished granite to be held for weeks and even months by Vermont producers until a sufficient quantity for a pool car can be accumulated; (3) that the witnesses' testimony is not properly summarized, as certain of them admitted they had not attempted to use existing motor service; certain of them expressed themselves as fairly well satisfied with rail service and had had very little damage on rail shipments; (4) that the testimony of the representatives of the Vermont granite producers is entitled to very little weight as their concerns do not pay the freight charges or control the considered traffic; that the representative of Rock of Ages Corporation was not sufficiently acquainted with the facts to stand cross-examination particularly with respect to his direct testimony that certain Georgia and Minnesota granite producers enjoyed motor-carrier transportation; (5) that the division obviously gave full weight to the testimony of the Vermont producers as it authorized service to points in 10 destination States from which no consignee appeared, and to 6 States from each of which only 1 consignee appeared; (6) that there are many motor carriers whose interline service has not been tried; (7) that the evidence does not establish that applicant would find it economically possible, in view of the small ship-

ments to many scattered points and the deadhead mileage involved, to render the proposed service; and (8) that a grant of the requested authority would have an adverse effect upon protestant rail lines.

In reply, applicant states that lower costs generally which can be obtained by the use of motor service with the resulting shorter holding time and time in transit, less damage, lower inventories, and less expensive crating, rather than lower rates as such, are the basis of the shippers' support. Applicant concedes that the Vermont granite producers do not pay the freight and that technically the consignees have the right to control the routing but points out that the consignees ordinarily leave the routing to the producers. Applicant asserts that the many arguments advanced and contentions made by petitioners have already been considered by division 5 in the prior report and are without merit. Applicant requests that the petitions be denied and the order of division 5 affirmed.

Applicant holds a certificate authorizing, so far as here material, the transportation (1) of granite from points in Grant County to points in Montana, Colorado, Nebraska, Kansas, Oklahoma, Missouri, Iowa, Minnesota, Wisconsin, Michigan, Illinois, Indiana, Ohio, Pennsylvania, and New York, and (2) of silicon carbide from Niagara Falls, N. Y., steelshot from Mansfield, Ohio, and polishing stucco from Fort Dodge, Iowa, and Chicago Heights, Ill., to points in Grant County, over irregular routes. The purpose of the instant proposal is to enable applicant to enlarge the destination territory of his present granite operations out of Grant County and to institute a new, similar west and southbound service from Vermont origins to the 16 States named in that part of the application. A grant of this authority would be advantageous to applicant from both an operational and financial standpoint, inasmuch as he would be able to obtain additional traffic

and also better balance his overall operations. He operates 14 tractor-trailer units and 1 additional tractor, of which 6 units are used exclusively for the movement of granite. Four units generally are used in the conduct of his private operations, described below. In the event the application is granted, vehicles used in transporting shipments from Grant County to certain eastern destinations, such as Ohio, West Virginia, Maryland, and the District of Columbia, would be deadheaded to the Vermont origin area under consideration, to pick up westbound traffic.

There are three granite-fabricating plants in the concerned South Dakota territory, some of which have their quarries and finishing plants in separate locations. In 1951, applicant transported a total of 157 loads of granite out of this area. At present, he transports one load a week to points in New York and Pennsylvania, and frequently returns with empty equipment. If the proposed service is authorized, he intends to station a dispatcher and several pieces of equipment either at Barre or Montpelier, Vt., and to perform a "shuttle" service between the described South Dakota and Vermont origins. He now offers third-day delivery from Grant County to points in Illinois, Indiana, and western Ohio, and fifth-day delivery to upstate New York points. He estimates that an additional day will be required to serve the proposed New England points and from 5 to 8 days the southern and eastern destinations involved. The delivery time from Vermont would be approximately the same as that from Grant County.

In addition to his motor-carrier business, to which he devotes about 90 percent of his time, applicant is also connected with several other enterprises. He operates a garage at Alby, S. Dak., owns a farm which from time to time is leased to others, and is a wholesale distributor of feed and other products for the Carey Salt Company.

Separate books are maintained for each of these businesses.

The Dakota Granite Company, of Milbank, S. Dak., has two quarries in Grant County at which granite is finished into mausoleums, monuments, and building forms. It ships to retail outlets by truck and by rail, principally in less-than-carload quantities. It uses applicant's service 2 or 3 times a week, and finds it very satisfactory. If such service were made available to the destinations here sought, this shipper would use it, in addition to other points, 7 or 8 times a year for the movement of shipments to the New England area. At the time of the hearing, it had orders to file from customers in Texas, Arkansas, North Dakota, West Virginia, and the New England States, all of which were accompanied by requests for delivery by motor carrier. It now has about 35 customers in Connecticut, of an estimated 100 dealers in that State. The shipper is developing a new territory for its products in Texas, and desires to have motor service to that State. It does not, at first, expect orders from this new territory to be large enough to justify carload shipments, and fears that less-than-carload shipments by rail might prove to be to costly for the dealer to handle initially. It estimates that in the beginning only about 24,000 pounds a year would move to that particular area. At the time of the hearing it also had in effect a contract under which it was shipping by rail substantial quantities of granite to a project in North Dakota near the Canadian border, for which motor-carrier service had been requested. Its customers pay the freight charges and have the privilege, if they desire, of designating the carrier to be used. In most instances, they request motor-carrier service for the movement of their small shipments, principally because they, particularly those at eastern points, are able to obtain split deliveries of small quantities at rates lower than less-than-carload rail rate. Furthermore, it has found that shipments

moving by motor carrier arrive at their destinations in shorter time and usually without being damaged. This shipper asserts that transportation rates play an important part in determining whether a particular transportation service can be used, especially when shipments are destined to points situated near other granite-producing areas. Also, the shipper would prefer to use applicant's service, rather than rail, because the cost of cartage to the rail siding (6½ miles distant) is eliminated, and the crating of the monuments need not be so thorough. It has not used the service of Dingmann in the past two years primarily because of rate considerations; however, it is willing to negotiate with intervener in this respect. Moreover, it prefers to use a carrier such as applicant whose equipment is stationed near its place of business; it has found that Dingmann takes 3 hours from St. Cloud, Minn., to pick up a shipment after being called, whereas it can obtain a truck from applicant in 30 minutes.

Osborne-Peterson, Inc., of St. Paul, Minn., a retail monument dealer, fabricates and letters granite monuments and markers. It receives both rough and finished granite from Barre, Vt., exclusively by rail, principally carload lots, and intends to continue using that service. Less-than-carload service is used when pool-car service is not available and there is a need for immediate movement of a particular shipment. Otherwise it directs that its shipments be held for a carload. From January 1 to June 13, 1952, it received a shipment which weighed 2,540 pounds, and consisted of 5 polished granite markers, separately crated, and which was in transit for 30 days. One of the crates was broken in transit, and all the markers were damaged to a degree rendering them unsuitable for the purpose for which they were ordered. No other complaints were specified. As a rule, the transit time on less-than-carload traffic ranges from 3½ to 6 weeks. This shipper's interest in the proposed operation

is motivated by its desire to receive small shipments more expeditiously and in better condition than at present, especially during the 2 months preceding Memorial Day, which is its busiest season. Under existing conditions, it has found that a monument should be delivered at its place of business sometime in March to assure Memorial Day installation. This shipper estimates it would use the proposed service, if authorized, 6 or 8 times a year for the movement of either truckload or less-than-truckload shipments.

A dealer at Hutchinson, Kans., retails public and private memorials to customers located generally in the southwestern section of Kansas. He purchases from 40,000 to 60,000 pounds of finished granite annually from manufacturers at Barre, Vt., which approximates 6 less-than-carload and 4 pool-car shipments. Pool-car shipments move over connecting rail lines to Kansas City where the car is broken down and from whence individual shipments are delivered to the consignee either by local rail or motor service. Although over a long period of time, the average time in transit by rail is 10 days, a transit time of from 14 to 21 days is not uncommon. In recent years, consignee has experienced some damage in using rail service, but does not consider it to be undue. He is interested in the proposed operation because it will reduce the amount of crating now necessary to protect the granite, require less handling of the lading, and be faster than existing rail service. Generally, his peak period extends from March to June, with April 1 being the deadline for Memorial Day deliveries. Applicant has assured him of a 9-day service, at the most, from Barre, which would be advantageous as it would enable him to extend the deadline for deliveries by as much as 2 weeks in some instances. However, this shipper has made no investigation to determine if any motor carriers are now available. He considers that speed is an essential element in the transportation of granite from Barre, but

does not expect the proposed service to alter his inventory situation. He would utilize applicant's proposed service principally for less-than-truckload shipments involving split deliveries, but would be willing to try other motor carriers.

A retail monument dealer at Fremont, Nebr., receives annually from Vermont origins 6 or 7 shipments of finished granite totaling about 25,000 pounds by pool-car and less-than-carload service. He considers that the proposed operation would be advantageous to him because it would be faster and more reliable than existing rail service and, thus, enable him to predict with some degree of accuracy when shipments would arrive. This is especially important during the peak season when delivery deadlines must be met. The proposed service would also permit him to compete more effectively with a nearby manufacturer who does his own finishing and thus can, with reasonable certainty, estimate when a particular order will be ready for delivery. In addition, he would be able to maintain a lower inventory and obtain transportation at a rate somewhat lower than that now in effect on less-than-carload rail shipments. He receives granite from sources in Minnesota by motor carrier and desires a similar type of service from Vermont origins. He has not investigated to determine whether any motor service is available from Vermont.

A retail monument dealer at Moberly, Mo., receives his granite products from Barre by rail; principally in less than carloads. The transit time for less-than-carload and pool-car shipments ranges from 7 to 18 days, with the average being 11.5 days. Because this dealer is located at the terminal point of a railroad, he considers rail service to be good. However, the proposed service would be advantageous, particularly during the peak season when expeditious service is required. He receives granite by motor carrier from the "northwest

and from the south" and finds such service very advantageous.

A monument dealer at Aberdeen, S. Dak., receives from 25,000 to 30,000 pounds annually of granite finished except for lettering, from Barre. Because of the comparatively small size of his business, he is unable to stock carload quantities, and it is not practicable for him to utilize pool-car service in conjunction with the other dealers because of the great distances between dealerships. Consequently, he receives all of his freight in less-than-carload lots. Shipments arrive in about 17 days, frequently with the crates broken, and at times, with the monuments damaged. As this shipper has no facilities to repair damaged monuments, any piece of granite which is damaged must be reordered. He considers that the proposed operation with the inherent advantages of motor-carrier service would be beneficial to his business, particularly where he could hold shipments to accumulate a truckload. This shipper has made no investigation of available motor carriers.

A retail monument dealer at Loves Park, a suburb of Rockford, Ill., purchases about 25,000 pounds of custom-designed monuments a year from manufacturers at Barre. These monuments are ready for erection in the cemetery upon arrival, and any damage in transit necessitates remanufacturing and, of course, reshipment. All of this dealer's monuments move by rail, in less-than-carload lots, and are received monthly in quantities of three or less. The transit time of this traffic ranges from 3 to 5 weeks. In using rail service, this dealer has experienced damage, consisting in some instances of monuments marred by grease or oil, or cracked. Formerly, he had his shipments delivered directly to his place of business, but because of delays at the railhead, he discontinued that method of operation. He now picks up his own shipments, receiving an allowance therefor from the railroad in those

instances where the latter was to provide the transportation. He is satisfied with such an arrangement, but would use the proposed service for the movement of all that traffic where delivery time is important. He has not investigated to determine whether or not other motor carriers are available.

Jones Brothers Company, of Barre, is engaged principally in the manufacture of granite monuments which are sold throughout the United States. In 1951, it shipped 1,600,000 pounds of granite to customers throughout the territory here involved, of which 600,000 pounds moved in less-than-carload quantities and the remainder in either carload or pool-car shipments. Carload service is admittedly satisfactory, but neither pool-car nor less-than-carload service is. Pool-car service is not deemed satisfactory in all respects because the first dealer to whom the consolidated shipment is consigned is held primarily responsible for all of the freight charges involved, and also the shipper must hold up delivery of orders until sufficient tonnage is accumulated to constitute the pool car. At times, this causes a long delay between the time the monuments are finished and the date shipped. This shipper is dissatisfied with less-than-carload service because of the length of transit time, the damage that occasionally occurs, and the cost involved. However, the usual transit time of less-than-carload shipments varies from 1 to 2 weeks. Of 117 dealers it presently supplies in the destination territory under consideration, 7 are in Minnesota, 2 in North Dakota, 6 in Montana, 9 in Colorado, 12 in Wisconsin, 31 in Illinois, 14 in Missouri, 12 in Iowa, 4 in Nebraska, 10 in Oklahoma, 3 in Arkansas, 5 in Texas, and 1 each in South Dakota and Louisiana. These dealers as a rule pay all the freight charges. This shipper finds that many of its small dealers, due to the disadvantages of less-than-carload service, are changing their buying habits and purchasing granite at centers where they are able to obtain faster

and cheaper motor transportation. It considers the lack of motor service a severe handicap in competing with other producers of granite in Georgia and Minnesota which, it understands, have motor service available to the destination territory here considered. In the event the proposed operation is not authorized, it is considering instituting private-carrier operations for the movement of this traffic. It now uses certain motor carriers to New York and Pennsylvania destinations, but has not tendered these carriers any traffic to points in the considered area as it understands they do not provide service thereto. It is of the opinion that a grant of the application would eventually prove beneficial even to the railroads because it would be able to acquire new dealers who, as their businesses developed, might become carload purchasers. This shipper desires motor service on a daily basis, if possible, and has no objection to the consolidation of its freight with that of other Barre manufacturers. It would not expect applicant to transport a single 1,000-pound shipment to, for example, Greeley, Colo., nor does it expect such a situation to arise as it believes applicant will have tonnage from other shippers destined to that general area. It estimates that about 3,000 pounds of granite would be tendered to applicant daily, if his services are available. It supplies the above-mentioned dealers at St. Paul and Hutchinson, and considers them to be typical customers with respect to their volume and type of business.

Rock of Ages Corporation quarries granite and manufactures finished monuments and markers which are distributed throughout most of the United States from 2 plants, 1 at Montpelier, Vt., 7 miles from Barre, and the other at Northfield, Vt., 22 miles from Barre. At the present time, it is endeavoring to build up its distribution to all of its dealers, but particularly to those in the 16 States here involved, as they have a high agricultural population. In this regard, it has been the ship-

per's experience that farmers provide the best market for its products. At present it has 168 dealers throughout the considered destination territory to whom it ships over 5,000,000 pounds of finished granite a year, exclusive of slabs and unfinished granite which move in carloads. Of these dealers, 123 purchase in less-than-carload quantities and 45 in carload lots. Whenever possible, pool-car shipments are made, but such service is not satisfactory because it is difficult for the first dealer to whom all of the freight is consigned, to pay the charge on the entire lot. In addition, some dealers have difficulty in collecting promptly from the other dealers who are consignees of the balance of the car, and others find the task of unloading and reforwarding burdensome, particularly where they are not located on rail sidings. The producer holds shipments 1 to 4 weeks to accumulate a carload. Less-than-carload service, which averages 2 weeks to transit and sometimes longer, is inadequate because of delays and damage to merchandise. Its crating of merchandise is the same for both rail and motor-carrier loading. During peak periods, such as Memorial Day, All Soul's Day, and Armistice Day delays make it difficult for its dealers to meet delivery dates. This shipper also is faced with competition from other granite manufacturers in the South and West, which, it understands, have motor service available. It utilizes motor service throughout New England and portions of New Jersey, Pennsylvania, and New York, but has never been able to obtain such service to points beyond Buffalo, N. Y. It sells to all of the supporting dealers, except the one at Moberly. It also is of the opinion that the instant proposal, over a period of time, would not only aid its own expansion program, but would also be helpful to the railroads from both a tonnage and revenue standpoint. Moreover, it contends that there is a need for faster and more frequent service in order to give the smaller dealers who cannot now, because of the capital investment re-

quired, carry in stock a representative group of monuments. It is of the opinion that there are excellent opportunities for expansion in such States as Missouri, Oklahoma, Texas, Arkansas, Nebraska, Iowa, and Minnesota, and that its salesmen could successfully take advantage of these opportunities if the proposed service were available. In the event the authority sought is granted, it would tender to applicant 2 or more truckloads of from 24,000 to 30,000 pounds, each week.

The Barre Granite Association is a trade association consisting of 77 members, all located in the Barre granite-producing area. Of its members, 5 are carriers, 5 do custom sawing and polishing of granite, and 67 are manufacturers of finished granite products. Included among the latter are the two shippers named immediately above. The function of the association is to represent its members in traffic and shipping matters. It does not sell granite but limits its activities to the consolidation of shipments and the arranging of pool-car service out of Barre for its members. During the period December 1, 1950, to December 1, 1951, this association arranged for the pool-car movement of 268 cars of granite to 900 dealers in 25 States. Of this tonnage, 156 cars were consigned to dealers in the States covered by this application, insofar as it proposes service from Vermont. The only motor service it selects is that used for local pickup and delivery service at each end of the movement. It favors a grant of the authority sought, and would assist its members in making use of it. It states that the source of supply of granite in Vermont is limited to the Barre area in Washington County, and Williamstown, Vt., in Orange County. The witness representing the association was also authorized to represent 18 individual members of this association for the purpose of stating that their position is the same as that set forth by the 2 preceding shippers. However, he was unable to present specific evidence concerning the tonnage each of the mem-

bers ships or the particular points to which their traffic moves.

The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the Texas and New Orleans Railroad Company, the Central Vermont Railway, Inc., and Dingmann presented evidence in opposition to the application.

Dingmann operates as a common carrier by motor vehicle, over irregular routes, of finished monumental and structural or partially finished granite from points in Grant County to points in certain Eastern and Midwestern States, including Maryland, Vermont, Connecticut, Massachusetts, and the District of Columbia. He has been hauling granite since 1941, and all of his drivers are experienced in the handling of that product. He maintains headquarters about 140 miles from Grant County and operates 10 pieces of equipment which, except during the 2-month period preceding Decoration Day, are not fully utilized. If the need arises for more equipment, he is able and willing to supplement his fleet. He offers 5- to 6-day service from points in Grant County to points in the States just named, and transports about 2 loads of granite a month from and to these points. Until about 18 months prior to June 13, 1952, the date of the first hearing herein, he provided service, without complaint, to the eastern territory here involved which he is authorized to serve for the supporting shipper, Dakota Granite Company. He asserts the latter company discontinued using his service solely because it considered his rates to be too high. He desires once again to serve that shipper, stating that his service is similar to that proposed by applicant. He is apprehensive that a grant of the requested authority would deprive him of the eastbound traffic he is now transporting from Grant County.

Milbank is located on the main line of the Chicago, Milwaukee, St. Paul and Pacific Railroad from which

point the latter renders direct service to Chicago where connections are made with other rail carriers for service to points and areas involved in the application. The Texas and New Orleans Railroad Company is primarily concerned with the proposed service insofar as it pertains to points in Louisiana and Texas, throughout which destination area it, in connection with other railroads, offers service. The Central Vermont Railway, Inc., originates granite traffic at four of its stations, namely, Barre, Montpelier, Northfield, and Waterbury, Vt., and competes with the Barre and Chelsea Railroad Company for the outbound movement of granite from that area. All of these rail carriers are ready and able to handle the involved traffic and believe that a grant of the authority requested would detrimentally affect their revenues.

On the foregoing facts, we are unable to conclude that the public convenience and necessity require the proposed operation. It is seen that for one reason or another the supporting witnesses find fault with the presently utilized rail service. Actually, however, the evidence warrants the conclusion that the witnesses are reasonably satisfied with rail service except for the one complaint that all share, namely, that rail service is too slow. Nevertheless, it is the practice for the Vermont shippers to hold finished granite until they can accumulate a pool-car load in order that the shipments may move at the lower pool-car rate. This practice is followed with the knowledge and consent of the consignees, and the sole purpose therein is to take advantage of the lower rail rate. Less-than-carload rail service, while not as expeditious as the proposed service, is fairly good, but because of the higher rate involved this service is seldom used by the supporting witnesses. The testimony of the South Dakota shipper also indicates that its support of the application is largely motivated by anticipated cheaper transportation.

We have carefully considered applicant's arguments to the contrary, but are forced to conclude that the service presently available is reasonably adequate. The evidence indicates that the witnesses' main purpose in supporting the application is to obtain rates rather than improved service. It is well established that this is not a proper basis for a grant of authority, and the application, therefore, must be denied.

All of the contentions of the parties have been considered even though not specifically discussed. In view of our conclusions herein it is unnessary to consider the question of applicant's fitness to conduct the proposed service.

Upon reconsideration, we find that applicant has failed to establish that the present or future public convenience and necessity require the proposed operation, and that the application should be denied.

An order will be entered, vacating and setting aside the order of May 24, 1954, and denying the application.

Commissioners Cross, Arpaia, and Clarke dissent.

Commissioner Hutchinson, being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX E

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 16th day of May, A. D., 1955.

No. MC 93529 (Sub-No. 2)

A. W. SCHAFFER EXTENSION—GRANITE
(Revillo, S. Dak.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Joint petition of Barre Granite Association, Jones Bros. Company, and Rock of Ages Corporation, for leave to intervene, oral argument and reconsideration, dated March 4, 1955;

(2) Petition of American Trucking Associations, Inc., for leave to intervene, reconsideration, and oral argument, dated March 4, 1955;

(3) Petition of applicant for reconsideration and oral argument, dated March 4, 1955;

(4) Reply of Eastern Railroads (except Chesapeake and Ohio Railway Company), protestants, dated March 16, 1955, to petition in (1) above;

(5) Reply of Eastern Railroads (except Chesapeake and Ohio Railway Company), protestants, dated March 16, 1955, to petition for intervention in (2) above;

(6) Reply of Eastern Railroads (except Chesapeake and Ohio Railway Company), protestants, dated March 16, 1955, to petition for reconsideration in (2) above;

(7) Reply of Eastern Railroads (except Chesapeake and Ohio Railway Company), protestants, dated April 8, 1955;

(8) Reply of certain Class I Western Trunk Line rail carriers, protestants, dated April 7, 1955, to petition in (3) above;

It is ordered, That said petitioners, Barre Granite Association, Jones Bros. Company, Rock of Ages Corporation, and American Trucking Associations, Inc., be, and they are hereby, permitted to intervene in said proceeding with the right to appear and participate in all further proceedings herein;

It is further ordered, That said petitions for reconsideration and oral argument be, and they are hereby, denied, for the reason that the discussion and findings of the Commission are substantiated by the record, and are in accordance with the law applicable thereto, and neither reconsideration nor oral argument is justified.

By the Commission.

(SEAL) HAROLD D. McCOY,
Secretary

APPENDIX F

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U.S.C., preceding § 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

SEC. 206. [*August 9, 1935, amended June 29, 1938, September 18, 1940, September 1, 1950.*] [*49 U.S.C., § 306.*] (a) (1) Except as otherwise provided in this section and in section 210a, no common carrier by motor

vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the

transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(2) Unless otherwise specifically indicated in such certificate, the holder of any certificate heretofore issued under this part, or hereafter issued under this part pursuant to an application filed on or before the date on which this paragraph takes effect, authorizing the holder thereof to engage as a common carrier by motor vehicle in the transportation in interstate or foreign commerce of passengers or property over any route or routes or within any territory, may without making application under this section engage, to the same extent and subject to the same terms, conditions, and limitations, as a common carrier by motor vehicle in the transportation of passengers or property, as the case may be, over such route or routes or within such territory, in commerce between places in the United States and places in Territories or possessions of the United States.

(3) Subject to the provisions of section 210, if any person (or its predecessor in interest) was in bona fide operation on March 1, 1950, over any route or routes or within any territory, as a common carrier engaged in the transportation of passengers or property by motor vehicle in commerce between any place in the United States and any place in a Territory or possession of the United States, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on March 1, 1950, during the season ordinarily covered by its operations and has so operated since that time), except in either instance as to inter-

ruptions of service over which such applicant or its predecessor in interest had no control, the Commission shall issue a certificate authorizing such operations without requiring further proof that public convenience and necessity will be served thereby, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after the date on which this subparagraph takes effect. Pending the determination of any such application, the continuance of such operation without a certificate shall be lawful. Any carrier which, on the date this subparagraph takes effect, is engaged in an operation of the character specified in the foregoing provisions of this subparagraph, but was not engaged in such operation on March 1, 1950, may under such regulations as the Commission shall prescribe, if application for a certificate is made to the Commission within one hundred and twenty days after the date on which this subparagraph takes effect, continue such operation without a certificate pending the determination of such application in accordance with section 207 (a).

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, con-

tinue such operation until otherwise ordered by the Commission.

ISSUANCE OF CERTIFICATE

SEC. 207. [*August 9, 1935.*] [*49 U.S.C., § 307.*] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.